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No. 93-1342

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1993

WILLIAM B. TANNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner was entitled to a writ of coram nobis to vacate his mail fraud conviction in light of *McNally* v. *United States*, 483 U.S. 350 (1987).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B1-B2) is not reported, but the judgment is noted at 9 F.3d 109. The district court's opinion (Pet. App. A1-A28) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 21, 1993. A petition for rehearing was denied on November 23, 1993. Pet. App. C1. The petition for a writ of certiorari was filed on February 18, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner pleaded guilty to one count of mail fraud, in violation of 18 U.S.C. 1341, and to three counts of filing a false income tax return, in violation of 26 U.S.C. 7206(1). He was sentenced to four years' imprisonment and ordered to pay a $16,000 fine. Petitioner did not file a direct appeal from his sentence. After completing his sentence, petitioner filed a petition for a writ of error coram nobis to set aside his mail fraud conviction. The district court denied the petition. Pet. App. A1-A28. The court of appeals affirmed. *Id.* at B1-B2.

1. Petitioner was the president and owner of the William B. Tanner Company, a commercial advertising business. In 1981, petitioner agreed to pay a kickback to Ted Filipowicz, the marketing director of Majik Markets, so that Majik Markets would continue to award its advertising business to petitioner's company. An investigation into petitioner's business also uncovered evidence that petitioner had filed false income tax returns with the IRS. Pet. App. A3-A7.

Petitioner pleaded guilty to a four-count information charging him with one count of mail fraud and three counts of filing a false income tax return. The mail fraud count alleged that petitioner devised a scheme to defraud Majik Markets of the "honest and faithful services" of Filipowicz. Pet. App. D2. It further alleged that the scheme was designed so that Filipowicz would use his position at Majik Markets to assure that Tanner Company "would receive certain advertising business from Majik Markets." *Ibid.* In return, Filipowicz would receive "cash" from Tanner Company. *Id.* at D2-D3. Both Tanner Company and Filipowicz "were to profit financially." *Id.* at D3.

2. While petitioner was serving his sentence, this Court held in *McNally* v. *United States*, 483 U.S. 350 (1987), that the mail fraud statute requires proof of a deprivation of money or property and does not extend to a deprivation of the intangible right to honest services. After completing his sentence, petitioner filed a petition for a writ of error coram nobis to set aside his mail fraud conviction in light of *McNally*.*

The district court held that the mail fraud count did not allege a violation under *McNally*. The court reasoned that the information did not allege that Majik Markets had been deprived of money or property since there was no allegation that Majik Markets incurred any additional costs as a result of the payments to Filipowicz. Pet. App. A16-A17. The court nonetheless held that petitioner was not entitled to coram nobis relief. Had it known that the mail fraud count was invalid, the court explained, it would have sentenced petitioner to the same four-year prison term. *Id.* at A25-A26. The court also denied relief because petitioner's "sentence ha[d] been executed, and there [were] no continuing civil disabilities not also caused by the three felony income tax convictions." *Id.* at A27.

The court of appeals affirmed. Without elaborating on the ground for its decision, the court stated that "no prejudicial error intervened in the judgment and proceedings in the district court." Pet. App. B1-B2.

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* Congress subsequently amended the federal fraud statutes to provide that a "scheme or artifice to defraud includes a scheme or artifice to deprive another of the intangible right of honest services." Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603, 102 Stat. 4508, codified at 18 U.S.C. 1346. That amendment, of course, does not apply to petitioner's conduct.

ARGUMENT

1. Petitioner contends (Pet. 11-44) that his mail fraud conviction rested on the intangible rights theory rejected in *McNally* and that he is therefore entitled to a writ of coram nobis to set aside that conviction. Petitioner's contention is without merit.

In *United States* v. *Morgan*, 346 U.S. 502, 512 (1954), this Court held that only errors "of the most fundamental character" warrant coram nobis relief. The Court also emphasized that the remedy should be granted "only under circumstances compelling such action to achieve justice." *Id.* at 511.

Petitioner failed to satisfy that demanding standard. While the information to which petitioner pleaded guilty alleged that petitioner had deprived Majik Markets of the "honest and faithful services" of Filipowicz, it also alleged that petitioner gave kickbacks to Filipowicz to assure that petitioner's company "would receive certain advertising business from Majik Markets." Pet. App. D2. Petitioner therefore pleaded guilty to a classic mail fraud violation under which petitioner obtained money from Majik Markets through fraud. In those circumstances, petitioner was not entitled to coram nobis relief. *United States* v. *Osser*, 864 F.2d 1056, 1063 (3d Cir. 1988) (coram nobis unwarranted when conviction rests on both intangible rights violation and deprivation of money or property violation) (collecting cases).

Petitioner asserts (Pet. 16) that the information did not charge that Majik Markets lost money or property since there was no allegation that Majik Markets "could have received better advertising at a better price or that Majik Markets paid a larger commission than agreed or customary." Such an allegation, however, was unnecessary. As Judge Hand explained in his opinion in *United*

States v. *Rowe*, 56 F.2d 747, 749 (2d Cir.), cert. denied, 286 U.S. 554 (1932):

> A man is none the less cheated out of his property, when he is induced to part with it by fraud, because he gets a quid pro quo of equal value. It may be impossible to measure his loss by the gross scales available to a court, but he has suffered a wrong; he has lost his chance to bargain with the facts before him. That is the evil against which the [mail fraud] statute is directed.

Post-*McNally* decisions have reached the same conclusion. *United States* v. *Wallach*, 935 F.2d 445, 463-464 (2d Cir. 1991); *United States* v. *Kerkman*, 866 F.2d 877, 880 (6th Cir.), cert. denied, 493 U.S. 828 (1989); *United States* v. *Fagan*, 821 F.2d 1002, 1009 (5th Cir. 1987), cert. denied, 484 U.S. 1005 (1988).

Kerkman is particularly instructive. There, the defendant took a kickback (from a supplier) while performing a fixed-price government contract. The defendant argued that he could not be guilty of mail fraud since the kickback did not cost the government any money. The court rejected that argument. By hiding the kickback, the court explained, the defendant had led the government to part with its money on the basis of a false premise. 866 F.2d at 880. Such conduct, the court held, fell squarely within the ambit of the mail fraud statute as described in *McNally*. *Ibid.* That reasoning is equally applicable here.

In any event, "[c]ollateral review of a final judgment * * * is not warranted absent a showing that the complainant suffers actual harm from the judgment that he seeks to avoid." *Lane* v. *Williams*, 455 U.S. 624, 633 n.13 (1982). Petitioner made no such showing. As the district court found (Pet. App. A27), petitioner has already

completed his sentence, and he suffers no continuing civil disabilities not also caused by his three unchallenged income tax convictions. Although petitioner asserts (Pet. 35) that his mail fraud conviction has continuing consequences, he does not challenge the court's finding that his income tax convictions have exactly the same consequences. For that reason as well, coram nobis relief was properly denied.

2. In the aftermath of *McNally*, there was considerable disagreement in the courts of appeals concerning the availability of coram nobis to set aside mail fraud convictions that were based on an intangible rights theory. In particular, the courts of appeals were divided on whether coram nobis relief was available when the indictment properly stated an offense, but the court's instructions permitted the jury to convict on an intangible rights theory. Compare *United States* v. *Keane*, 852 F.2d 199 (7th Cir. 1988) (coram nobis unwarranted), cert. denied, 490 U.S. 1084 (1989); *United States* v. *Stoneman*, 870 F.2d 102 (3d Cir. 1989) (same), cert. denied, 493 U.S. 891 (1989) with *United States v. Mandel*, 862 F.2d 1067 (4th Cir. 1988) (coram nobis available), cert. denied, 491 U.S. 906 (1989); *Allen* v. *United States*, 867 F.2d 969 (6th Cir. 1989) (same). There was also a conflict on how to determine whether a conviction had the kind of continuing consequences that would justify coram nobis relief. Compare *Hirabayashi* v. *United States*, 828 F.2d 591 (9th Cir. 1987) (government must rebut presumption of continuing consequences) with *Keane*, *supra* (petitioner must demonstrate continuing legal consequences).

In light of those conflicts, the government filed a petition for a writ of certiorari in *Mandel*, and acquiesced in the petition for a writ of certiorari in *Keane*. This Court, however, denied both petitions. In the ensuing five years, the number of cases raising coram nobis is-

sues in light of *McNally* has steadily declined, and few, if any, such claims are likely to arise in the future. See note *, *supra*. Accordingly, there is even less reason now to grant certiorari in cases presenting such issues.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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